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IN THE

Supreme Court of the United States

OCTOBER TERM, 1964

No. [redacted] 204

MID-FLORIDA TELEVISION CORP., *Petitioner*

v.

FEDERAL COMMUNICATIONS COMMISSION AND WORZ, INC., *Respondents*

Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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BRIEF FOR THE RESPONDENT WORZ, INC. IN OPPOSITION

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OPINION BELOW

The opinion of the Court of Appeals is not yet reported. The text thereof appears as Appendix A to the Petition filed herein.

JURISDICTION

The judgment of the Court of Appeals remanding this cause to the Federal Communications Commission was entered on March 4, 1965. The Petition for a Writ

of Certiorari was filed on June 1, 1965. The jurisdiction of this Court has been invoked under 28 U.S.C. 1254(1).

QUESTION PRESENTED

The respondent respectfully submits that the question presented is: Whether the Court of Appeals may, consistent with its authority to review decisions of the Federal Communications Commission, set aside the Commission's grant of a television construction permit and remand the proceedings to the Commission for a new hearing where: (1) the record upon which the Commission based its decision had been compiled approximately ten years before the decision; (2) the Commission had refused to conduct a new hearing despite its admission that decisionally significant changes had occurred in the comparative structure of the original applicants since the existing record had been compiled; (3) the Commission had attempted to supplement the existing record by means of an *in camera* proceeding; (4) a proper record could only be compiled by means of a full evidential hearing, and (5) the question of the legality of the Commission's proceedings was properly before the Court of Appeals.

STATUTES INVOLVED

The pertinent statutory provisions are set forth in the Petition, at p. 3.

STATEMENT

Almost thirteen years ago, the Respondent, WORZ, Inc. (hereinafter WORZ), filed an application with the Federal Communications Commission (hereinafter Commission) for a permit to construct a commercial television station on Channel 9 in Orlando, Florida.

Subsequently, on November 16, 1963, the Petitioner, Mid-Florida Television Corp. (hereinafter Mid-Florida), filed its application for the same facility. As is required in the case of such conflicting applications, an evidential hearing was held before one of the Commission's Hearing Examiners in December, 1954, with further hearing sessions in March, 1955. Upon the conclusion of the full evidential hearing, the Hearing Examiner, who had presided throughout the hearing and had observed all of the witnesses, rendered a decision on August 10, 1955, granting the application of the Respondent, WORZ, and denying the application of the Petitioner, Mid-Florida. In every area of comparative consideration, the Examiner found for WORZ over Mid-Florida.[1] Thereafter, the case was considered by the Commission upon exceptions filed by Mid-Florida. By its Decision of June 7, 1957 (22 F.C.C. 1254), the Commission reversed its Examiner and granted the application of Mid-Florida. The Commission's Decision was affirmed by this Court.[2]

WORZ's Petition for a Writ of Certiorari was granted on October 27, 1958,[3] this Court vacating the judgment of the Court of Appeals upon being advised

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[1] In such cases, the decision to grant one of a number of competing applications turns in great part upon a consideration of what have come to be known as the "standard comparative criteria." Included among the criteria are such factors as the residence, civic participation, broadcast experience and proposed operational function of stockholders and/or principals in the applicant group, as well as the applicant's proposals in such areas as programming, studios, equipment and staffing.

[2] *WORZ, Inc.* v. *Federal Communications Commission,* 257 F. 2d 199, 103 U.S. App. D.C. 195 (1958).

[3] *WORZ, Inc.* v. *Federal Communications Commission,* 358 U.S. 55 (1958).

that testimony before a Congressional committee had revealed that certain *ex parte* representations in behalf of Mid-Florida had been made to Commissioner Richard A. Mack during the pendency of the case before the Commission. The Court of Appeals, in turn, vacated the Commission's grant to Mid-Florida and remanded the case to the Commission with instructions to hold, "with the aid of a specially appointed hearing examiner," an evidential hearing looking toward full disclosure of the facts attending the *ex parte* revelations previously adduced and to determine whether either of the parties should be disqualified by reason thereof.[4]

Pursuant to the directive of the Court of Appeals, the Commission's Chief Hearing Examiner was specially appointed to conduct a hearing into the *ex parte* matters. The Chief Hearing Examiner, subsequent to a full evidential hearing, issued an Initial Decision (1963 J.A., pp. 18-33)[5] holding, in substance, that the Commission's 1957 grant to Mid-Florida was void by reason of the participation of Commissioner Mack therein and that the petitioner here, Mid-Florida, should be absolutely disqualified from participating in further proceedings by reason of the fact that it had been aware of and had ratified *ex parte* representations made to Commissioner Mack in its behalf. This holding was premised upon the Examiner's findings that (1) one William H. Dial, an Orlando, Florida, attorney in the employ of Mid-Florida, had, while the matter was *sub judice* before the Commission, repeatedly made

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[4] *WORZ, Inc.* v. *Federal Communications Commission*, 268 F. 2d 889, 106 U.S. App. D.C. 14 (1958).

[5] See f.n. 6, Petition, for explanation of Joint Appendix references.

extra-record overtures to Mack urging the grant of Mid-Florida's application and (2) that the denials of Mid-Florida's principals that they had any knowledge of Dial's activities were unacceptable as being "unreasonable, incredible and contrary to human experience," (1963 J.A., p. 29). The Commission, however, rejected the Initial Decision of its Chief Hearing Examiner and, in its January 8, 1963 Report and Recommendation to the Court of Appeals (1963 J.A., pp. 32-46), held that Mid-Florida had not ratified and had no knowledge of the *ex parte* representations which had been made in its behalf. Then-Chairman Minow dissented from the Commission's report, noting that "The Examiner who heard and saw the witnesses found that responsible officers and stockholders of Mid-Florida knew of, and ratified, Mr. Dial's improper approaches. The record does not justify the majority's reversal of this finding." (1963 J.A., p. 41).[6]

The majority of the Commission recommended to the Court of Appeals that it be authorized to reconsider the case on the basis of the existing record and further oral argument, but with no further evidential hearing. Chairman Minow recommended, however, that the Commission's further proceedings should include the consideration of a comparative demerit against Mid-Florida on the basis of the Chief Hearing Examiner's finding, and his agreement therewith, that Mid-Florida was aware of the *ex parte* representations made in its behalf. The Chairman also recommended

[6] The office of the General Counsel, FCC, which participated in the proceedings before the Chief Hearing Examiner, also strongly urged the Commission to absolutely disqualify Mid-Florida, concluding from the evidence adduced that "one or more of the principals of Mid-Florida directly or indirectly secured, aided, confirmed, ratified, or knew of Dial's misconduct."

that the Commission be authorized to consider—after new oral argument—whether to grant one of the existing applications or to reopen the record for new applications.

Upon consideration of the Commission's Report and Recommendation, the Court of Appeals stated, "We accept the view that neither Mid-Florida nor WORZ is disqualified; but in line with the Chairman's position we hold that the Commission is authorized to decide, after new oral argument, whether to grant one of the existing applications or to reopen the record for new applications."[7] Further, the Court of Appeals stated:

> "Nothing we have said is intended to preclude the Commission from deciding that the record is so stale, the filing of new applications should be permitted. Mid-Florida has been operating on Channel 9 at Orlando under program test authority issued January 31, 1958, pursuant to the Commission's rules, but this authorization was granted prior to our affirmance on May 15, 1958, of the Commission's first comparative decision. Revelations as to various situations prior to that date and the more recent developments may point to the need for a new public interest determination of who should have the license to operate on the channel." (footnote omitted)[8]

The further proceedings before the Commission consisted essentially of (1) oral argument by the parties and the Commission's Broadcast Bureau, and (2) an *in camera* review, by the Commission, of certain docu-

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[7] *WORZ, Inc.* v. *Federal Communications Commission*, 323 F. 2d 618, 619; 116 U.S. App. D.C. 316, 317 (1963), cert. denied, 376 U.S. 914 (1964).

[8] *Id.* at 620 and 318, respectively.

ments (ownership reports) filed by the parties over the years in connection with matters unrelated to the comparative proceedings. At oral argument, the Commission's Broadcast Bureau stated: "We strongly urge the Commission to reopen the record in this proceeding, to permit the filing of new applications. While we recognize there is no absolute disqualification of either of the applicants, we recognize the record in this decision is so stale that a comparative selection would be unrealistic, because of conditions that have occurred since the Commission's original assessment of the comparative differences betweeen the applicants in June, 1957." (1964 J.A., p. 39).

In its Decision of June 12, 1964 (36 F.C.C. 1535, appended to 1964 J.A.), the Commission affirmed the June 7, 1957 grant of the Mid-Florida application, having concluded—based upon the further proceedings described above—that "no necessity exists to reopen the record for new applications" and that it did not believe "that the record of this proceeding is so stale that the filing of new applications should be permitted." (36 F.C.C. 1537).

WORZ appealed the Commission's decision on the grounds, *inter alia,* that the Commission was not entitled to determine the comparative standing of the parties since the closing of the original record in 1955 by means of an *in camera* review of documents filed by the parties with the Commission for purposes unrelated to the comparative hearing. WORZ argued further, as it had during the entire course of the proceedings, that a comparison on the basis of the original record entitled it to a grant but that if that record were fatally stale, the record must be reopened and a new evidential hearing held.

In its opinion reversing the Commission and remanding the proceedings (Appendix A, Petition), the Court of Appeals related the extraordinary history of the case and, referring to its 1963 remand to the Commission for further proceedings, noted that it had particularly "invited the Commission to consider whether, in the light of this unsatisfactory history and the staleness of the original record, the public interest would not be best served by reopening the proceedings, permitting new or additional applications to be filed, and making a choice among them on the basis of a new record." The Court noted further that the Commission had rejected such a procedure and had determined, instead, "to reaffirm the award to Mid-Florida on the basis of the record made ten years ago." After specifically acknowledging the Commission's large area of discretion in such matters, the Court pointed out that the case had been beset by "a variety of dubious circumstances [which had] prolonged the ultimate choice an unconscionably long period beyond the assembling of the facts upon which that choice must of necessity . . . be based". The Court stated further that it was not prepared to say "that the guardianship of the public interest, entrusted by Congress to the Commission, is adequately effectuated by confining the choice to these two applicants in the light of facts put on the record over ten years ago," and ultimately held that with or without the filing of applications by new parties, "the award of this authority should be set down for a new hearing."

ARGUMENT

By reason of the Court of Appeals' judgment and opinion below, the Federal Communications Commission is now required to compile a current record upon which to base its choice as to what party shall operate the commercial television station on Channel 9, in Orlando, Florida. The Commission has not been denied the right to bring to bear its discretion and expertise in ultimately making such a judgment nor has any party to the prior proceedings conclusively gained or irrevocably lost a right by reason of the Court's decision. Quite simply, the Court's action goes essentially to assuring the fundamental requirement that administrative decisions in such matters be premised upon a viable and meaningful record.

The petitioner's reliance upon the pronouncements of this Court in *Federal Communications Commission* v. *Pottsville Broadcasting Co.*, 309 U.S. 134 (1940) and in the recent case of *Federal Communications Commission* v. *Taft B. Schreiber* (slip opinion, Case No. 482, decided May 24, 1965) is submitted as ill-founded. Although these cases, as do others cited by Mid-Florida, unquestionably require that reviewing courts refrain from imposing their judgment upon administrative agencies in matters reserved to the agencies by Congress, it is submitted that they do not foreclose a reviewing court from assuring that the agency has complied with the basic requirements common to any adjudicatory function—be it administrative or judicial. In the instant case it is tolerably clear that the Commission, despite its formal pronouncement to the contrary, was itself convinced that the ten year old record upon which it undertook to base its final comparative decision was fatally stale. This conclusion necessarily

flows from the fact that the Commission, upon the remand from the Court of Appeals, engaged in a patently unsuccessful and invalid attempt to supplement the existing record by means of an *in camera* proceeding apparently designed to avoid the necessity of reopening the record. Thus, the Court of Appeals' directive to reopen the record constitutes nothing more than a requirement that the Commission come squarely to grips with the fact that by reason of the extraordinary delay occasioned in the instant case, a current record must be compiled.

Reference to the opinion below leaves no doubt that the Court of Appeals was, in deciding the case, acutely aware of the fact that the choice between competing applicants for a broadcast license is essentially a matter for the Commission's judgment.[9] It is further apparent from the Court's opinion that the ultimate choice is to be made exclusively by the Commission, applying its standard hearing procedures and weighing the comparative standing of the parties according to its informed judgment and without conditions imposed by the Court. The exclusive effect of the Court's decision is to document the obvious fact that the choice of an applicant to operate the subject facility has been prolonged "an unconscionably long period beyond the assembling of the facts upon which that choice must of necessity be based" and to require the Commission to compile a current record before making *its* choice.

Mid-Florida argues that there is no precedent for such action by a reviewing court and, by implication,

[9] "The Commission has, of course, a large area of discretion to decide between applicants for the privileges committed to its care, both generally and under the terms of our last remand in this proceeding." (Opinion, p. 3a, Petition).

that it is therefore beyond the bounds of allowable judicial review. There is, in fact, a paucity of authorities turning on the precise question at issue, i.e., the "staleness" of an administrative record. Moreover, it is probable that a factual pattern as presented by the instant case has not occurred in the past and will not occur in the future. Far from supporting Mid-Florida's position, however, the absence of direct precedents and the factual uniqueness here involved tend, it is submitted, to support the proposition that the Court of Appeals was here confronted with an extraordinary situation unquestionably requiring the positive implementation of its corrective powers.

Mid-Florida correctly suggests that the case of *Atchison, etc. R. Co.* v. *United States,* 284 U.S. 248 (1932)—one of the few cases dealing with "staleness" per se—has been restricted to its special facts. Although this Court refused to apply the *Atchison* doctrine in the case of *United States* v. *Pierce Auto Lines,* 327 U.S. 515 (1949)—also relied upon by Mid-Florida—it is to be noted that in both *Atchison* and *Pierce* the reviewing court had been asked to order a rehearing in light of after-developing circumstances extrinsic to the hearing issues themselves, i.e., the depression and World War II. In the instant case, of course, the Court of Appeals has neither been asked to nor has it ordered a rehearing in light of any extinsic circumstances nor, in fact, has it ordered a rehearing as such. As noted above, its order goes exclusively to assuring that the Commission has before it a current, meaningful record of the facts as they bear on the very nature and composition of the party to whom the grant to operate Channel 9 will ultimately be awarded. It must, of course, be borne in mind here that such pro-

ceedings before the Commission turn almost exclusively upon the composition of a given applicant in terms of the individuals involved; their financial, legal and technical qualifications; their experience, interests, etc. Thus, such proceedings are markedly distinct in character from rate or similar proceedings wherein the composition of the administrative litigant is merely an incident of the proceedings. Thus, although the pronouncements of this Court regarding staleness of administrative records, in such cases as *United States* v. *Pierce,* supra, are clearly controlling in such matters, it would seem apparent that they should not be taken to prohibit the action taken by the Court of Appeals in the instant case.

The record upon which the Commission has now undertaken to base its choice as to which applicant is better qualified to operate the subject television facility was compiled in late 1954 and early 1955. By reason of extraordinary circumstances developing thereafter, it was not until almost ten years later that the Commission issued its final decision. Two years prior thereto, however, the Commission had been invited to consider the question of the staleness of the original record by reason of the Court of Appeals' remand in *WORZ; Inc.* v. *Federal Communications Commission,* 323 F. 2d 618, 116 U.S. App. D.C. 316 (1963)[10] It was at this point in the proceedings that the Commission clearly demonstrated its intention to avoid reopening the record and to accord only semantical significance to the issue of staleness of the record.

In its final decision (36 F.C.C. 1535, 1946 J.A.), the Commission stated that it did not believe "that the

[10] See "Statement", p. 6, supra.

record of this proceeding is so stale that the filing of new applications should be granted," and further noted that the award would, therefore, "be based upon an evaluation of the significant differences between WORZ and Mid-Florida as shown under the comparative criteria" (36 F.C.C. at 1537). Nevertheless, the Commission thereupon undertook to supplement the existing record by means of an *in camera* review of Commission records for the admitted reason that "Changes have occurred in the composition of both applicants with the passage of time." (36 F.C.C. at 1539). That such a procedure is a patently ineffective and invalid substitute for the required evidential hearing in such cases is of secondary importance here.[11] Of significance, however, is the *fact* of the Commission's attempt to supplement the existing record, for the existing record either was or was not a sufficient vehicle for decision. Despite the fact that the Commission characterized the record as not being "so stale" as to require reopening and the filing of new applications, its own actions belied its words. Thus, it is submitted, did the Commission virtually compel the Court of Appeals to require, as a minimum procedural as well as substantive standard, the compilation of a current record by means of a "new hearing."

Mid-Florida suggests (p. 11, Petition) that such considerations as administrative efficiency and the time required to hold new proceedings are among those reserved to the "expert agency" to appraise in connection with a decision to hold a new comparative hearing.

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[11] This Court has, of course, upheld a party's right to a full and fair evidential hearing in such cases of administrative adjudication, e.g., *United States* v. *Storer Broadcasting Company*, 351 U.S. 192 (1956).

That such considerations are germaine and ordinarily within the agency's discretion is true. It may not be reasonably argued, however, that such considerations are to be accorded decisional precedence over the concomitant necessity that the agency adhere to minimal substantive and procedural requirements. It is unfortunately apparent that in this instance the Commission has accorded concepts such as administrative efficiency and the time involved in a new hearing undue weight. The Commission's determination to rid itself of what has unquestionably been a troublesome and distasteful proceeding is understandable. Nonetheless, this Court has held that an administrative agency may not "compromise on the footing of convenience or expediency, or because of a natural desire to be rid of harassing delay, when the minimal requirement has been neglected or ignored." *Ohio Bell Telephone Co.* v. *Public Utilities Commission,* 301 U.S. 292, 304 (1937). Further, the Court has held that where an administrative agency undertakes an adjudicatory function—as opposed to its more general pursuits such as rule-making or general fact-finding—"it is imperative that [the agency] use the procedures which have traditionally been associated with the judicial process." *Hannah* v. *Larche,* 363 U.S. 420, 442 (1960). A necessary incident of the requirement for an evidential hearing in such matters is the compilation of a current, meaningful record upon which the agency may bring to bear its expertise. That "minimal requirement", traditionally associated with the judicial process, has not been met in this instance.

Mid-Florida's suggestion (pp. 14-15, Petition) that the issue of reopening the record was not before the Court of Appeals is ill-founded. As noted above

(pp. 6-7), the issue was initially posed to the Commission upon the *ex parte* remand in 1963 and was raised on appeal below by WORZ. The appropriateness of the issue has never been contested by the Commission and in fact the issue has been considered on its merits and decided, although erroneously, by the Commission. Thus, it is apparent that the issue had been before the Commission for the purpose of Section 405 of the Communications Act and was properly before the Court on appeal.

WORZ does not agree with Mid-Florida's argument that the decision of the Court of Appeals was prompted by reason of the *ex parte* aspects of the case as such (pp. 16-18, Petition). As has been pointed out, the Court was specific in its holding that the Commission's decision had been delayed "an unconscionably long period beyond the assembling of the facts" upon which that decision must be based and that, therefore, the matter should be "set down for a new hearing." It is true, of course, that the unconscionable delay of which the Court of Appeals spoke was the *result* of the *ex parte* aspects of the case and it is also true that by reason of those developments the integrity of the Commission's processes themselves were at issue. There is no support, however, for the suggestion that the Court's decision rested exclusively upon the *ex parte* nature of the case. Needless to say, had the Commission in 1957 accepted the Examiner's decision on the comparative issues or the Chief Hearing Examiner's decision on the *ex parte* matters in 1963, the case in all probability would have developed so as to have precluded the present state of affairs. Be that as it may, it is manifest that the Court of Appeals has addressed itself to the state of the Commission record, without according decisional significance to the *ex parte* aspects as such.

CONCLUSION

The Federal Communications Commission is accorded a wide area of discretion in dealing with those matters submitted to its care by Congress. Its area of discretion is particularly broad in instances where the Commission is called upon to apply its expertise in choosing among applicants for broadcast facilities. It is precisely for the reason that the Commission is afforded such freedom within its mandate that it must remain acutely aware of its concomitant obligation to observe the fundamental requirements of the adjudicatory process. In what is submitted as an understandable albeit lamentable attempt to rid itself of a disturbing matter, the Commission has here failed to observe the most fundamental aspect of the adjudicatory process, i.e., the compilation of a reasonbly accurate and current record upon which to base its expert judgment. The Court of Appeals was entitled, indeed obliged, to require the Commission's adherence to this basic principle. In so doing, the Court has not invaded the Commission's province. It remains to the Commission, within its wide area of discretion and in the light of its expertise, to make an unfettered decision as to who will operate the subject broadcast facility. The instant case turns upon extraordinary, if not unique, circumstances. The Court of Appeals' decision is clearly warranted in light thereof. The Petition for a Writ of Certiorari should not be granted.

Respectfully submitted,

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